No. 89-1762

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

WILLIAM BLYTHE MYERS, JAMES ALLEN PRESTON, SPAR GAS, INC., OVAL HITCHCOCK, MARY ANN CATRON, AND WILLIAM LYLE CATRON,

Petitioners,

vs.

AP PROPANE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the Court of Appeals grant mandamus to protect the constitutional right to jury trial where that right has been improperly denied?

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Neither the decision of the Court of Appeals nor that of the District Court is reported.

JURISDICTION

The decision of the Sixth Circuit denying mandamus was dated and filed February 15, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides in relevant part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

RULES INVOLVED

Rule 65 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

STATEMENT OF THE CASE

Petitioners are a small family owned business which distributes liquid propane gas in central Tennessee, its owners and certain of its employees. Respondent is one of the largest liquid propane distributors in the United States. Respondent is also a competitor of petitioners in

central Tennessee. After respondent closed its office at Carthage, Tennessee and consolidated its operations at Lebanon, Tennessee, it fired petitioner Preston who had been manager of its Carthage office. Preston, who did not have a non-competition agreement, thereafter went to work for petitioner Spar Gas in its new Carthage office. Preston thereafter employed, on behalf of Spar Gas, a tank wagon driver, petitioner Myers, who had left respondent's employment and who had signed a covenant not to compete. Respondent then brought this action for injunctive relief and damages for alleged breach of the covenant not to compete, tortious interference with the covenant not to compete and improper use of respondent's allegedly confidential and proprietary information.

At the hearing on respondent's motion for a temporary restraining order, the Court stated that it would hold a hearing within ten days "on a preliminary injunction, or a final injunction at one time" and "The case will be set for trial, for final hearing, on October 8th at 10:00." Thereafter, on October 1, 1987, the Court issued a temporary restraining order stating in relevant part: "A hearing on the matter of preliminary and final injunction is set in this case on October 8, 1987 at 10:00 a.m., . . . ". On October 8, 1987, the petitioners appeared for the injunction hearing. At the commencement of that hearing, the following colloquy was held:

> "Mr. Varon (Counsel for respondent): Your Honor, I will – I just want to make sure. This is for injunctive relief, right? There is no – .
>
> The Court: This is a combination of temporary and permanent injunction, period."

At the conclusion of the hearing the following colloquy occurred:

> Mr. Varon: Excuse me. Are we still going to have the damage proceeding possibly at some future point in time?
>
> The Court: If it gets to that. We're going to have that. That's right. But the primary situation here now is the injunction relief. Now, then, does anybody want to submit any briefs?
>
> * * *
>
> The Court: Because this is an injunction hearing and I've got to dispose of it. But I don't want to cut you off, because I want your briefs. It will be helpful.

Because petitioners had no right to a jury trial with respect to a hearing for either a preliminary or permanent injunction, no jury demand was made at that time.

On October 27, 1987, each of the petitioners filed a timely Answer to the Amended Complaint in which each demanded a jury trial. On December 22, 1987, the District Court issued a final injunction against the petitioners for a period of one year.

The Court then issued an order impanelling a jury for the sole purpose of determining damages. Petitioners then filed a motion for a jury trial on all issues raised by the Amended Complaint. That motion was denied by the Court. Petitioners then sought a writ of mandamus in the Sixth Circuit to compel the District Court to impanel a jury to try all issues raised by the Amended Complaint. On February 15, 1990, the Court of Appeals denied the writ.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals decision conflicts with applicable decisions of this Court.

In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959), this Court reversed the denial of mandamus relief by the Ninth Circuit, stating:

> Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled. [footnote, citing authorities, omitted].

In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court again reversed the denial of a writ of mandamus to vacate an order striking petitioner's demand for a jury trial. The Court referred approvingly to *Beacon Theatres* as one which "emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury . . . " 369 U.S. at 472.

B. The decision of the Court of Appeals conflicts with prior precedent in the Sixth Circuit, as well as with decisions in other Courts of Appeals.

In most circuits, mandamus has been available in the Court of Appeals to review an order denying a right of trial by jury. *In re Union Nacional de Trabajadores*, 502 F.2d 113, 115-116 (1st Cir. 1974), *vacated on other grounds*, 527 F.2d 602 (1975); *Lee Pharmaceuticals v. Mishler*, 526 F.2d 1115, 1116-1117 (2d Cir. 1975); *Eldredge v. Gourley*, 505 F.2d 769, 770 (3d Cir. 1974); *General Tire & Rubber Co. v.*

Watkins, 331 F.2d 192, 194 (4th Cir.), *cert. denied*, 377 U.S. 952, 84 S. Ct. 1629, 12 L.Ed.2d 498 (1964); *Black v. Boyd*, 248 F.2d 156, 159-161 (6th Cir. 1957); *In re Vorpahl*, 695 F.2d 318, 319 (8th Cir. 1982); *Owens-Illinois, Inc. v. U.S. District Ct.*, 698 F.2d 967, 969 (9th Cir. 1983); *In re Zweibon*, 565 F.2d 742, 745-746 (D.C. Cir. 1977).

In *Black v. Boyd, supra*, the Sixth Circuit Court of Appeals, quoting this Court in *Ex parte Simons*, 247 U.S. 231 (1918), held a District Court order denying a right of trial by jury presented the exceptional circumstances justifying the issuance of a writ of mandamus by the Court of Appeals to review the ruling. In the instant case, the same Court of Appeals did not refer to *Black v. Boyd* in its order denying petitioners' writ of mandamus.

In *Kamen v. Nordberg*, 485 U.S. 939 (1988), this Court declined to review the Seventh Circuit's denial of a writ of mandamus involving the denial of a jury trial. Justice White, in dissent from the denial of the petition for a writ of certiorari, observed that the Seventh Circuit's decision in *Kamen* was not only in conflict with the majority of decisions of other Courts of Appeals, but appeared to be inconsistent with this Court's prior decisions in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood*.

Until the Sixth Circuit's denial of petitioners' writ of mandamus in this case, the Seventh Circuit stood alone in denying review by writ of mandamus of the constitutional right to trial by jury. The majority of circuit courts of appeals have consistently held that denial of a claimed right to a jury trial is so significant an issue as to warrant review by writ of mandamus.

C. The Constitutional Right To Trial By Jury Involves A Question of Exceptional Importance.

As recently as *Lytle v. Household Manufacturing, Inc.*, 58 *U.S. Law Week* 4341 (March 20, 1990), this Court recognized its "long standing commitment to preserving a litigant's right to a jury trial." This Court has consistently held that the right to trial by jury is a basic and fundamental element of federal jurisprudence. *Simler v. Conner*, 372 U.S. 221, 222 (1963); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943). Both this Court and the Sixth Circuit have previously held that orders denying a party a jury trial are important enough to be reviewable prior to the trial by writ of mandamus. *Beacon Theatres, Inc. v. Westover, supra; Black v. Boyd, supra.*

As this Court stated in *Ex parte Simons, supra*: "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded."

Petitioners' right to a jury trial is clear. The District Court combined a hearing on a temporary and final injunction. Petitioners had no right to demand a jury for a hearing involving only injunctive relief. Immediately after the hearing, each petitioner filed a timely Answer demanding trial by jury. The District Court denied each jury demand, resulting in petitioners being required to accept the Court's credibility determinations instead of those of the jury.

The Court of Appeals, without reference to its own precedent, followed the Seventh Circuit departing from both the precedent of this Court and the majority of the Courts of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted and the order below reversed.

Dated: Nashville, Tennessee

May 11, 1990

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

AP PROPANE, INC.,	)	
Plaintiff,	)	No. 2-87-0079
	)	HON. L. CLURE
VERSUS	)	MORTON
	)	
WILLIAM BLYTHE MYERS, ET AL.,	)	
	)	
Defendants.	)	

ORDER

Upon conducting preliminary pretrial conferences in the above-captioned case on October 12, 1989, and again on December 18, 1989, and upon consideration of the argument of counsel and the entire record herein:

IT IS HEREBY ORDERED that defendants' "Motion For Jury Trial On The Merits With Respect To All Issues Raised By The Complaint" is denied; and

IT IS HEREBY FURTHER ORDERED that plaintiff A. P. Propane, Inc.'s "Motion for Request for Pretrial Ruling That Plaintiff's Fixed Overhead Expenses Should Not Be Deducted From Its Gross Revenues In Calculating Lost Profits" is granted; and

IT IS HEREBY FURTHER ORDERED that plaintiff's Motion for Recovery of Attorney Fees in connection with its efforts to obtain injunctive relief in this action is taken under advisement; and

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a), FRCP, on 12/21/89. By: poa

IT IS HEREBY FURTHER ORDERED that defendants shall respond to plaintiff's proposed stipulations dated October 23, 1989, and December 15, 1989, no later than January 18, 1990, and the parties shall respond to all other requests for stipulations within thirty (30) days of the date served; and

IT IS HEREBY FURTHER ORDERED that for any stipulation about undisputed facts requested by plaintiff to which defendants fail to agree and that plaintiff is required to prove, and does prove, plaintiff shall be entitled to an award of costs, including reasonable attorney's fees, expenses in connection with such efforts; and

IT IS HEREBY FURTHER ORDERED that a preliminary pretrial conference in this matter is set for February 6, 1990, at 10:00 a.m.

/s/ L. Clure Morton
L. Clure Morton
United States District Judge

No. 90-5076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Spar Gas, Inc.; Spar Gas Carthage; Mary Ann Catron; William Lyle Catron; Oval Hitchcock; James Preston; Blythe Myers,	)	ORDER
Petitioners.	)	FILED FEB 15 1990

Before: KEITH and NORRIS, Circuit Judges; and JOINER, Senior District Judge*

The petitioners seek a writ of mandamus directing the district court to empanel a jury for trial on the merits of the underlying action. The district court has responded by submitting copies of its opinion and order denying a jury trial on the merits, but granting a jury trial on damages.

Mandamus is an extraordinary remedy, *Kerr v. United States District Court*, 426 U.S. 394 (1976), and will be granted only when the petitioner shows that "its right to issuance of the writ is 'clear and undisputable.' " *In re: Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)). Mandamus is not a substitute for appeal. *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per curiam), *cert. denied*, 449 U.S. 834 (1980). We conclude that petitioners have not demonstrated the exceptional

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* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

circumstances which justify invocation of this extraordinary remedy. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-62 (1978).

The petition for a writ of mandamus is **ORDERED** denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, jy
Clerk

Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

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Petitioners,

v.

AP PROPANE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June 11, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Must a court of appeals grant mandamus to review a trial court's refusal to grant a jury demand when the record below plainly establishes that petitioners waived any right to a jury trial by failing to request a jury until after the trial on liability was completed?

THE PARTIES TO THIS PROCEEDING

All parties are identified in the caption of this case except for Spar Gas-Carthage, Inc., a defendant in the lower court, which has not sought certiorari.

RULE 29.1 LIST

Respondent AP Propane, Inc. is 50 percent owned by AmeriGas, Inc., which is a wholly-owned subsidiary of UGI Corporation, 49 percent owned by Prudential Insurance Company and 1 percent owned by Mellon Bank, N.A. AP Propane, Inc. has no subsidiaries except wholly-owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent AP Propane, Inc. respectfully submits this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Respondent AP Propane, Inc. ("AP"), is in the business of selling propane gas. In 1987, AP purchased Cal Gas Corporation ("Cal Gas"), another propane gas seller which had outlets in Carthage and Lebanon, Tennessee.

Petitioners Myers and Preston were former employees of Cal Gas's Carthage, Tennessee office. While employed by Cal Gas, Preston and Myers were provided with confidential business information. Myers also executed an agreement of employment containing a covenant not to compete. (Memorandum and Order of federal district court, dated December 22, 1987 at 3, hereinafter referred to as "Memorandum and Order of December 22, 1987").

Preston and Myers eventually left AP's employ and almost immediately became employed by petitioner Spar Gas, Inc. and/or Spar Gas-Carthage, Inc., owned by petitioners Mary Ann and Lyle Catron and Oval Hitchcock (hereinafter collectively referred to as the "Spar Gas defendants"). Spar Gas Inc. and/or Spar Gas-Carthage, Inc. sell propane gas in competition with AP, *inter alia*, in the Carthage, Tennessee area. Both before and after joining Spar Gas, Myers and Preston solicited former Cal Gas customers utilizing Cal Gas's confidential business information and sold propane gas to former Cal Gas customers in direct contravention of Myers's employment agreement. (Memorandum and Order of December 22, 1987 at 8 and 13).

Respondent subsequently filed in the U.S. District Court for the Middle District of Tennessee, Northeastern Division, a complaint for temporary, preliminary and permanent injunctive relief and damages arising from defendant Myers's breach of his covenant not to compete, the breach of the duties of loyalty owed by Preston and Myers, tortious interference with contractual relations, conspiracy and unfair competition. On September 29, 1987, the court partially

granted respondent's request for a temporary restraining order and clearly stated:

> [I]'m going to set this case for trial right away. I'm going to set it for trial within ten days . . . This case will be set for trial, for final hearing, on October 8th, at 10:00 o'clock. (Transcript, Hearing on T.R.O., September 29, 1987 at 21).

In its October 1, 1987 Memorandum issuing the T.R.O., the district court further explained that while success on the merits was clear as to Myers, it would "be necessary to have a full and complete hearing in the matter to determine what, if any, actions have been taken by [the Spar Gas defendants and Preston] which violate[ ] the rights of [AP]. . . . " (Memorandum and Order of federal district court, dated October 1, 1987 at 3).

On October 8, 1987, the court held a consolidated hearing on the injunction and trial on the merits consistent with Fed. R. Civ. P. 65(a)(2). After hearing the evidence, the judge asked both parties to file simultaneous post-trial briefs. Respondent's brief not only set forth arguments in favor of injunctive relief, but also explicitly detailed the arguments supporting a finding of liability on its legal claims and requested that a hearing on damages be set. Although allowed by the court to file a reply brief, petitioners declined to do so and, thus, did not dispute the appropriateness of respondent's arguments on liability.

In an order issued on December 22, 1987, the district court issued an injunction against petitioners and set a hearing on damages for a later date. In the accompanying Memorandum, the court found squarely

for respondent, holding that Myers was liable for breach of his covenant not to compete and his duty of loyalty, that Preston was likewise liable for breach of duty of loyalty, and that Preston, Spar Gas, Mary Ann Catron, Lyle Catron and Oval Hitchcock were liable for tortious interference and unfair competition. (Memorandum and Order of December 22, 1987).

Significantly, at no time before, during or immediately after the consolidated hearing did petitioners raise the question of a jury demand concerning the trial on the merits. Instead, a request for a jury trial was first made by petitioners in their Answers filed two weeks and five days after the trial on the merits. More importantly, it was not until after the filing of all post-trial briefs and after the issuance of the court's December 22 decision finding all petitioners liable, that petitioners for the first time argued, in two separate motions to alter and amend the judgment, that the October 8 hearing was for injunctive relief only, that any finding as to liability was, therefore, improper and that petitioners were entitled to a jury trial on the merits of respondent's legal claims.

In a February 25, 1988, Memorandum rejecting petitioners' argument that they were improperly denied a jury trial, the court stated that "[t]rial on the merits was held on October 8, 1987," that defendants did not request a jury trial before, during or immediately after the trial on the merits and that "defendants, having failed to timely request trial by jury, have waived their rights to trial by jury on the issues adjudicated by the court. . . . " (Memorandum and Order of federal district court, dated February 25, 1988 at 2 and 4).

In October 1989, petitioners' new counsel yet again filed motions requesting a jury trial on the merits. The district court once more denied petitioners' request in an order dated December 21, 1989.

Petitioners, in January 1990, then filed Notices of Appeal concerning the district court's denial of their request for a jury trial on the merits and a Petition for Writ of Mandamus asking the United States Court of Appeals for the Sixth Circuit to order the district court to empanel a jury for a trial on the merits.

On February 15, 1990, the Sixth Circuit denied the Petition for Writ of Mandamus. On April 16, 1990, the Sixth Circuit granted respondent's motion to dismiss petitioners' notices of appeal for lack of appellate jurisdiction on the grounds that these appeals were impermissibly interlocutory. The Sixth Circuit also granted respondent's request for sanctions against petitioners for having brought a frivolous appeal.[1]

The trial on damages which the lower court directed be held in its December 22, 1987 Memorandum, after several continuances, has now been scheduled to begin on July 31, 1990. With respect to the damages trial, petitioners' request for a jury will be honored.

REASON FOR DENYING THE WRIT

A. Mandamus Was Properly Denied In This Case

Where, as here, it is apparent from the record below that petitioners made an untimely jury request

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[1] On April 30, 1990, petitioners filed a Motion to Reconsider Order for Sanctions. Respondent, on May 2, 1990, filed an opposition to this motion. The matter is still pending before the Sixth Circuit Court of Appeals.

after the conclusion of the trial on the merits, the Court of Appeals properly denied petitioners' request for a writ of mandamus.

Time and again, the Court has held that mandamus relief is a drastic remedy to be invoked only in extraordinary circumstances and that as a condition to obtaining mandamus relief the party seeking issuance must satisfy the burden of showing that the right to issuance of the writ is clear and indisputable. *Mallard v. United States District Court*, 109 S. Ct. 1814 (1989); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980); *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Kerr v. United States District Court*, 426 U.S. 394 (1976); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953). *See also In re Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983).

Here, petitioners cannot meet their burden of showing that their right to mandamus relief is clear and indisputable as they waived their right to a jury trial by failing to make a timely demand. Federal Rule of Civil Procedure 65(a)(2) provides that a court may order a trial on the merits to be consolidated with a petition for injunctive relief. While this rule is to be construed so as to save to the parties any right they may have to trial by jury, Fed. R. Civ. P. 65(a)(2), this right is not absolute. As in any other situation, the failure to make a timely request for a jury trial in the context of Rule 65(a)(2) constitutes a waiver of that right. *Carlyn v. City of Akron*, 726 F.2d 287, 288 (6th Cir. 1984) (finding no basis for appellant's post judgment objections that a right to jury trial had been denied given the trial judge had made clear that he would consolidate a hearing on a T.R.O. with the merits of the case and no objection was made at that

time); *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333, 338 (3d Cir. 1974) (where party did not request a jury trial and did not object to consolidation of a hearing on preliminary injunction with a final hearing on the merits, party deemed to have waived right to jury trial). *See also United States v. Moore*, 340 U.S. 616, 621 (1951) (failure of respondent to raise jury request constituted waiver). Thus, once petitioners here failed to make a timely jury demand and allowed the trial to proceed with no objection, they lost the right preserved to them under Rule 65(a)(2).

Even if an argument could be made that petitioners' late request for a jury should have been considered by the trial court pursuant to its discretionary powers under Fed. R. Civ. P. 39(b), mandamus relief would still be inappropriate given that the Court has previously held that when a matter is confided to the discretion of the trial court, mandamus relief should not be granted as "it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chemical* 449 U.S. at 36 (citing *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 666 (1978)). *Accord In re Recticel Foam Corp.*, 859 F.2d 1000, 1006 (1st Cir. 1988). *See also Cochran v. Birkel*, 651 F.2d 1219, 1221 n.4 (6th Cir. 1981) (mandamus relief not available for untimely jury request as the matter was within the discretion of the district judge), *cert. denied*, 454 U.S. 1152 (1982).

B. The Court Of Appeals' Decision Does Not Conflict With Applicable Supreme Court Decisions

Petitioners inappropriately rely on the Court's decisions in *Beacon Theaters Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S.

469 (1962), to support their argument that a writ of mandamus was proper here. Indeed, both of those decisions dealt with cases combining equitable and legal claims and a party's right to have the legal claims heard by a jury. In both cases, the Court held that mandamus relief should have been granted on the grounds that the litigants had been improperly denied a right to trial by jury.

However, in both cases, the requests under consideration were timely made. In *Beacon Theaters*, the defendant, Beacon, raised a timely request for a jury trial in a counterclaim and cross-claim. Similarly, in *Dairy Queen*, the defendant raised a request for a jury trial in a timely filed answer. Hence, the timeliness of these requests was not an issue under consideration, but a given, thereby allowing the Court in both cases to consider whether the denial of the jury requests had been proper.

This point is made abundantly clear by the *Dairy Queen* Court which explained that "*Beacon Theaters* requires that any legal issues for which a trial by jury *is timely and properly demanded* be submitted to a jury." *Dairy Queen*, 369 U.S. at 473 (emphasis added). Having found that there was "no question of the timeliness or correctness of the demand involved," the Court went on to consider whether triable legal issues were present in the pending action. *Id.*

Thus, the holdings in *Beacon Theaters* and *Dairy Queen* do not stand for the proposition that mandamus relief is available as a matter of course whenever a jury demand has been denied. Rather, the mandamus relief mandated by these cases only becomes available if a timely and proper jury request has been made. Given that, here, petitioners' demand was not

timely made, petitioners' request falls outside of the ambit of *Beacon Theaters* and *Dairy Queen*. Moreover, the Court has also held that the issuance of a writ of mandamus is in large part a matter of discretion with the court to which the petition is addressed. *Kerr*, 426 U.S. at 403 (citations omitted). *Accord In re City of Detroit*, 828 F.2d 1160, 1167 (6th Cir. 1987). The Court of Appeals' refusal to grant mandamus here, therefore, does not conflict with prior Supreme Court decisions but, in fact, is consistent with the very language and intent of the Court's holdings.

C. The Court Of Appeals' Decision Neither Conflicts With Other Courts of Appeals' Precedents Nor Other Sixth Circuit Decisions

The Court of Appeals' decision to deny petitioners' request is consistent with other courts of appeals' decisions considering mandamus relief for the denial of a jury trial demand. While acknowledging the dictates of the Court's holdings in *Beacon Theaters* and *Dairy Queen*, the various courts of appeals have never routinely issued mandamus relief without first considering the requesting party's right to a jury trial. Rather, the courts have interpreted *Beacon Theaters* and its progeny to mean that a writ should issue if the requesting party is entitled to a jury trial. *See, e.g., Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 969 (9th Cir. 1983); *In re Union Nacional de Trabajadores*, 502 F.2d 113, 116 (1st Cir. 1974), *vacated on other grounds*, 527 F.2d 602 (1975). In those cases where the right has been found lacking or waived due to an untimely request, the courts consistently have denied the issuance of the writ.

For example, in *General Tire & Rubber Co. v. Watkins*, 331 F.2d 192 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964), the court denied mandamus relief on the grounds that the petitioner's request for a jury trial had been untimely and that the trial court was not obligated under Fed. R. Civ. P. 39(b) to allow the belated request. The Eighth Circuit Court of Appeals similarly denied a mandamus petition, finding that the petitioner had no statutory right to a jury trial under the Employee Retirement Income Security Act of 1974. *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982). *Accord In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980) (denying mandamus relief on the grounds that no right to a jury trial exists under § 36(b) of the Investment Company Act of 1940), *cert. denied*, 451 U.S. 910 (1981).[2]

In several other cases, the courts have found it necessary to resolve a contested timeliness issue in favor of the requesting party before allowing the writ to issue. *Myers v. United States District Court*, 620 F.2d 741 (9th Cir. 1980); *In re Zweibon*, 565 F.2d 742 (D.C. Cir. 1977); *Higgins v. Boeing Co.*, 526 F.2d 1004 (2d Cir. 1975).

Likewise, in other cases cited by petitioners, the courts have allowed the writ to issue only after de-

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[2] Petitioners cite Justice White's dissent from this Court's decision not to grant certiorari in *Kamen v. Nordberg*, 485 U.S. 939 (1988), another case concerning the lack of a right to jury trial under § 36(b). However, petitioners' reliance on this dissent is misplaced in that Justice White's opinion clearly challenges the Seventh Circuit's analysis of the standards for granting mandamus in an unrelated case, *First National Bank of Waukesha v. Warren*, 796 F.2d 999 (7th Cir. 1986), and does not imply that mandamus should issue when no right to a jury trial exists.

termining that a right to trial by jury did exist. *Lee Pharmaceuticals v. Mishler*, 526 F.2d 1115 (2d Cir. 1975) (holding that in a suit for injunctive relief, a jury demand in a counterclaim for money damages was proper and should not have been dismissed); *Eldredge v. Gourley*, 505 F.2d 769 (3d Cir. 1974) (ordering a jury trial unless the trial court determined that petitioner's counterclaim lacked substance as a matter of state law); *Union Nacional de Trabajadores*, 502 F.2d at 113 (stating that denial of mandamus relief is proper if no right to a jury trial exists, but finding a statutory right under 18 U.S.C. § 3692).[3]

Finally, petitioners' assertion that the Court of Appeals decision here is inconsistent with other decisions of that court is plainly mistaken. In *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1957), relied upon by petitioners, two parties requested mandamus relief from a district court order striking jury demands raised in their answers and in one of the party's counterclaim and cross-complaint. In its decision, the court first clearly stated that the jury requests had been seasonably demanded. *Id.* at 158. Thus, unlike here, the timeliness of the requests was not an issue in *Black*. Second, the court only partially granted mandamus relief, finding that no right to a jury trial existed on the issues raised in the original complaint, answers and counterclaim, but that a jury trial right did attach to the one petitioner's cross-complaint. *Id.* at 162 and 163. Therefore, consistent with the pro-

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[3] The court of appeals later withdrew this decision, *In re Union Nacional de Trabajadores*, 527 F.2d 602 (1st Cir. 1975), based on this Court's subsequent holding in *Muniz v. Hoffman*, 422 U.S. 454, (1975), that there is no right to a jury trial under 18 U.S.C. § 3692.

cedures followed by the various other appellate courts, the Court of Appeals in *Black* based its decision to issue a limited writ on a determination that a right to a jury trial existed and had not been waived. Here, the court could not make that same determination and, thus, correctly did not issue a writ of mandamus.

D. Denial Of The Writ Did Not Deprive Petitioners Of Their Constitutional Right To Jury Trial

The Court of Appeals' denial of petitioners' request for a writ of mandamus did not deny petitioners their Constitutional right to a jury trial. While Rule 65(a)(2) expressly preserves petitioners' right to trial by jury on all legal claims heard in the consolidated hearing, petitioners waived that right by failing to make a jury request in a timely fashion.

Although the Court has voiced its "longstanding commitment to preserving a litigant's right to a jury trial," *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1337 (1990), neither *Lytle* nor any other decision of this Court is dispositive here, for in each case where the Court has acted either via mandamus or appellate review to preserve a litigant's jury trial right, it has done so because of a lower court error, not because of an error on the part of the litigant. By failing to act, petitioners lost their right to a jury trial, and were properly denied review by mandamus. Should petitioners continue to desire to pursue their dubious jury right claim, they are free to do so by way of appeal after the conclusion of the July 31, 1990 damages trial and entry of final judgment.

CONCLUSION

The Court of Appeals properly denied petitioners' mandamus request. Moreover, the Court of Appeals'

decision is in complete accord with decisions of this Court and other courts of appeals. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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